

ONE VERIZON, TWO VERIZON, THREE VERIZON,
 MORE? – A COMMENT: *RIAA v. VERIZON* AND
 HOW THE DMCA SUBPOENA POWER
 BECAME POWERLESS

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INTRODUCTION

Emerging technologies and their incredible capabilities present to the world a catch-22. With regard to taking advantage of these new innovations, governments, businesses, and the public worldwide are damned if they do and damned if they don't. They are "damned if they do" because of the inevitable conflicts created by the uncertainties that accompany every aspect of cyber-communication and operation. They are "damned if they don't" because they would forego the astounding benefits this technology presents now and in the future. The Internet, in particular, has created an array of perplexing cyber issues such as content regulation,¹ juris-

¹ Currently, there exists no general international regulatory body for the Internet because different laws and cultures prevent countries from reaching agreement in many areas including speech, content, and privacy. See, e.g., Susan P. Crawford et al., *The Accountable Internet: Peer Production of Internet Governance*, 9 VA. J.L. & TECH. 9 (2004); Justin Hughes, *The Internet and the Persistence of Law*, 44 B.C. L. REV. 359, 360 (2003) (discussing "three distinct meta-visions of the relationship between the Internet and the law . . . the 'no-law Internet' story, the 'Internet as a separate jurisdiction,' and Internet law as 'translation.'").

diction,² and numerous other legal controversies that transcend physical borders.³ Online copyright infringement is a universally-recognized cause of action, and litigation in this area has moved to the forefront of the digital debate as peer-to-peer (“P2P”) file sharing has made infringing music copyrights as easy as one, two, three.⁴

Recent legal battles demonstrate that past attempts to mix music and the Internet have been as successful as mixing oil and water. The music industry’s first step in protecting its copyright ownership was to battle websites that perpetuated copyright in-

International Internet regulation does exist to some extent in the area of domain name regulation. The Internet Corporation for Assigned Names and Numbers (“ICANN”) is a private-sector group established independently of any government, although at the suggestion of the United States in 1998, to set policy for the allocation of Internet Protocol number blocks and root servers worldwide. In its six years of existence, ICANN has encountered continuous problems in maintaining a unified, international board to govern this aspect of the Internet. See Susan P. Crawford, *The ICANN Experiment*, 12 CARDOZO J. INT’L & COMP. L. 409 (2004) (explaining three flawed models of governance used to describe ICANN).

² See, e.g., Gregory Wrenn, *Cyberspace is Real, National Borders are Fiction: The Protection of Expressive Rights Online Through Recognition of National Borders in Cyberspace*, 38 STAN. J. INT’L L. 97, 101 (2002) (“[C]ourts must find a way to apply regulation to the Internet while respecting meaningful limits to their ability to apply local regulations to foreign Internet activity.”).

³ International case law involving online disputes is increasingly abundant. However, each country’s need and desire to uphold its own laws against the backdrop of the Internet, while respecting the laws and judgments of other countries, remains a complex problem. See, e.g., *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 169 F. Supp. 2d 1181, 1192-93 (N.D. Cal. 2001) (finding a French court’s judgment requiring a U.S. Internet Service Provider to restrict its online content could not be enforced in the United States.)

[T]he French order’s content and viewpoint-based regulation of the web pages and auction site on Yahoo.com, while entitled to great deference as an articulation of French law, clearly would be inconsistent with the First Amendment if mandated by a court in the United States Absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity is outweighed by the Court’s obligation to uphold the First Amendment. *rev’d en banc* 379 F.3d 1120 (9th Cir. 2004) (holding that the California District Court did not have personal jurisdiction over the French defendants), *reh’g granted*, 2005 U.S. App. LEXIS 2166.

⁴ The original P2P networks were administered by a central server, which managed access to the files available on the network Current P2P networks, in contrast, operate in a decentralized fashion—that is, without a central server. The software that connects each computer on the network conducts the search-and-retrieval process [as opposed to a central server].

CONGRESSIONAL BUDGET OFFICE, *COPYRIGHT ISSUES IN DIGITAL MEDIA* 18 (August 2004), available at <http://www.cbo.gov/showdoc.cfm?index=5738&sequence=0> (last visited Apr. 25, 2005). Peer-to-peer networks facilitate copyright infringement by making music easily available for downloading. Downloading is the ability of Internet users to access the hard drives of other Internet users and transfer files stored on those drives using P2P programs. “To download means to receive information, typically a file, from another computer to yours via your modem The opposite term is upload, which means to send a file to another computer.” *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1010 n.1 (9th Cir. 2001) (citations omitted).

fringement by facilitating music sharing networks.⁵ While that battle has endured for several years, the fight has also turned against the allegedly infringing Internet users themselves. Leading this plight is the Recording Industry Association of America (“RIAA”) who calls the shots on behalf of its member copyright owners.⁶ In September and October 2003, the RIAA threatened lawsuits against 465 Internet users allegedly engaged in illegal music sharing online.⁷ Because music downloading is anonymous in nature, the RIAA first sought the identities of the alleged infringers from each user’s Internet service provider (“ISP”).⁸ The RIAA sought this identifying information by issuing subpoenas pursuant to the Digital Millennium Copyright Act (“DMCA”).⁹

Since its inception, the entire DMCA has been mercilessly attacked and new legislation aiming to fix or repeal part of it is constantly being proposed.¹⁰ While industries and lawmakers try to

⁵ In 2001, centralized P2P operator Napster was found contributorily and vicariously liable for copyright infringement because it posted users’ song lists and aided in the transfer of music files. The Ninth Circuit Court of Appeals granted a preliminary injunction against the website operator. *See Napster*, 239 F.3d 1004. However, in 2003, decentralized P2P operator Grokster prevailed in a similar suit brought by organizations in the motion picture and music recording industries. *See MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1040 (C.D. Cal. 2003) (granting defendant Grokster’s motion for summary judgment against claims of contributory and vicarious liability for copyright infringement because, unlike Napster, when Grokster “users search for and initiate transfers of files using the Grokster client, they do so without any information being transmitted to or through any computers owned or controlled by Grokster.”), *cert. granted*, 125 S. Ct. 686 (2004).

⁶ “The Recording Industry Association of America (RIAA) is the trade group that represents the U.S. recording industry. Its mission is to foster a business and legal climate that supports and promotes our members’ creative and financial vitality.” Recording Industry Association of America, *About Us*, at <http://www.riaa.com/about/default.asp> (last visited Apr. 25, 2005).

⁷ *See* John Borland, *Record Industry Warns of New Lawsuits*, CNET News.com (Oct. 17, 2003), at http://news.com.com/2100-1027-5093078.html?tag=sas_email (last visited Apr. 25, 2005).

⁸ The RIAA used normal Internet tracking devices to ascertain the infringing user’s Internet Protocol (“IP”) address. This information led to the RIAA’s knowledge of which ISP the user subscribed to, but it did not give information regarding the user’s identity. *See In re Verizon Internet Servs., Inc., Subpoena Enforcement Matter, Recording Indus. Ass’n of Am. v. Verizon Internet Servs.*, Civil Action 02-MS-0323, 240 F. Supp. 2d 24, 26 (D.D.C. 2003) [hereinafter “Verizon I”]. By September 2003, the RIAA had issued more than 1500 subpoenas seeking the names and addresses of alleged infringers. *See* Katie Dean, *RIAA Landslide Begins*, Wired.com (Sept. 8, 2003), at <http://www.wired.com/news/digiwood/0,1412,60345,00.html> (last visited Apr. 25, 2005).

⁹ 17 U.S.C.A. § 512(h)(1) (2005) states: “A copyright owner or a person authorized to act on the owner’s behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.”

See infra Part I.

¹⁰ The Digital Millennium Copyright Act (DMCA) was enacted on October 28, 1998. DMCA, Pub. L. No. 105-304, 112 Stat. 2860 (1998). For a list and summaries of proposed legislation addressing Digital Rights Management, see American Library Association, *DRM Legislation*, at <http://www.ala.org/ala/washoff/WOissues/copyrightb/digitalrights/legisla>

grapple with this legislation, the potential uses and abuses of the DMCA subpoena power have created a new storm of controversy in the music-sharing mayhem. ISP Verizon Internet Services (“Verizon”) was the first to contest the RIAA’s use of the DMCA subpoena as a means of identifying its users.¹¹ In April 2003, the United States District Court for the District of Columbia decided in favor of the RIAA and allowed the organization to continue issuing subpoenas pursuant to section 512(h) of the DMCA.¹² In December 2003, the D.C. Circuit Court of Appeals reversed that opinion.¹³

Part I of this Comment introduces the statutory text of the DMCA that is especially controversial to this debate. Part II and Part III outline the key components of the Verizon cases to date. Parts IV through VI examine the validity of each party’s statutory and constitutional arguments. A judicially created First Amendment balancing test is outlined in Part VII and John Doe litigation is discussed in Part VIII. Finally, this Comment will conclude by supporting a United States Supreme Court reversal of the December 2003 Court of Appeals decision.

I. THE DIGITAL MILLENNIUM COPYRIGHT ACT

A. *Purpose*

Congress constructed the Digital Millennium Copyright Act (“DMCA”) with a dual purpose in mind – it sought the need to limit the liability of service providers while providing copyright owners broad protection of copyrights on the Internet.¹⁴ The statute offers liability protection to service providers and remedies against infringement to copyright owners. Upon its creation, the DMCA was intended to be a solution that allows cooperation between copyright owners and those who have the capacity to prevent

tion.htm (including information on the Consumers, Schools and Libraries Digital Rights Management Awareness Act of 2003, introduced soon after the RIAA began suing file-sharers and the P2P Piracy Prevention Act) (last visited Apr. 25, 2005).

¹¹ See *Verizon I*, 240 F. Supp. 2d 24.

¹² See *In re Verizon Internet Servs., Inc., Subpoena Enforcement Matter, Recording Indus. Ass’n of Am. v. Verizon Internet Servs.*, Civil Action No., 03-MS-0040, 257 F. Supp. 2d 244, (D.D.C. 2003) [hereinafter “Verizon II”]. For the procedural history and outcome of *Verizon I* and *II*, see *infra* Part II.

¹³ See *Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), *cert. denied*, 125 S. Ct. 309 (2004) [hereinafter “Verizon Appeal”].

¹⁴ Congress believed that the DMCA successfully “balanced the interests of content owners, on-line and other service providers, and information users in a way that will foster the continued development of electronic commerce and the growth of the Internet.” H.R. REP. NO. 105-551, pt. 2, at 21 (1998).

ongoing infringement.¹⁵ The section of the DMCA that deals with ISP liability is Title II, entitled the “Internet Copyright Infringement Liability Clarification Act,” and is found in Title 17, section 512 of the United States Code.¹⁶

Title II begins by articulating four safe harbors where service providers¹⁷ can enjoy immunity from copyright infringement under certain conditions. Section 512(a), entitled “Transitory digital network communications,” provides immunity to an ISP¹⁸ that transmits, routes, or provides connections for infringing material if the service provider and the material meet conditions listed in this subsection.¹⁹ Section 512(b) provides immunity from liability “for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the [ISP].”²⁰ Section 512(c), titled “Information residing on systems or networks at the direction of users,” creates immunity from liability “for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider,”²¹ as long as “the ISP meets certain conditions regarding its lack of knowledge concerning, financial benefit from, and expeditious efforts to remove or deny access to, material that is infringing or that is claimed to be the subject of infringing activity.”²² Lastly,

¹⁵ H.R. REP. NO. 105-551, pt. 1, at 11 (1998).

¹⁶ Title II preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment. At the same time, it provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.

S. REP. NO. 105-190, at 25 (1998).

¹⁷ A service provider is defined as “a provider of online services or network access, or the operator of facilities therefore.” 17 U.S.C. § 512(k)(1)(B) (2000). *See infra* note 47 for the complete text of § 512(k)(1).

¹⁸ Section 512(k)(1)(A) defines “service provider” with specific reference to § 512(a), but the § 512(k)(1)(B) definition “includes any entity described in subparagraph (A).” *See* RIAA’s Reply Brief in Support of Motion to Enforce at 5, *Verizon I*, 240 F. Supp. 2d 24 (D.D.C. 2003) (Case No. 1:02MS00323) (arguing that section 512(h) “applies to all service providers, not just those that store infringing material. The DMCA’s definition of ‘service provider’ makes that crystal clear. § 512(k)(1)(A)-(B). Remarkably, not once in its brief does Verizon ever mention this dispositive statutory text.”).

¹⁹ 17 U.S.C. § 512(a) (2000). The conditions require that the transmission be initiated by an Internet user, that the ISP activity be “an automatic technical process without selection of the material by the service provider,” that no copy of the material on the system be overly accessible or kept on the system longer than necessary, and that the material “is transmitted through the system or network without modification of its content.” *Id.* § 512(a)(1)-(5).

²⁰ 17 U.S.C. § 512(b) (2000). This section also requires the ISP to meet certain conditions regarding the transmission and retrieval of the material created by the ISP in the process of system caching. *See id.* §§ 512(b)(2)(A)-(E).

²¹ 17 U.S.C. § 512(c) (2000).

²² *Verizon Appeal*, 351 F.3d at 1234.

section 512(d) provides a safe harbor from liability “for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools.”²³

Copyright owners may request the identification of alleged copyright infringers under the subpoena power of section 512(h).²⁴ A subpoena request is filed with the court clerk and must include:

- (a) a copy of a notification described in subsection (c)(3)(A);
- (b) a proposed subpoena; and
- (c) a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will be used for the purpose of protecting rights under this title.²⁵

This and other references to section 512(c)(3)(A) in the subpoena power provision have caused confusion as to which ISPs are subject to subpoena pursuant to the DMCA.²⁶

Section 512(c) is a safe harbor providing immunity to an ISP with knowledge of infringing material residing on its system provided that the ISP follows certain “notice and take down” procedures.²⁷ Once an ISP receives notification that infringing material resides on its system, it must act expeditiously to remove or disable access to the material.²⁸ The elements of notification are set forth in section 512(c)(3) and require, among other things, “[i]dentification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.”²⁹ There has been great controversy over interpreting the meaning of

²³ 17 U.S.C. § 512(d) (2000). This subsection is subject to the same conditions as in §§ 512(c)(1)(A)-(C). See 17 U.S.C. § 512(d)(1)-(3) (2000).

²⁴ 17 U.S.C.A. § 512(h)(1) (2005) states: “A copyright owner or a person authorized to act on the owner’s behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.”

²⁵ 17 U.S.C. § 512(h)(2) (2000).

²⁶ Verizon Online Services is the first ISP to debate this issue in a legal setting. See *Verizon I*, 240 F. Supp. 2d 24; see also *infra* Part II.

²⁷ A service provider shall not be liable . . . by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider . . . (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

17 U.S.C. § 512(c)(1)(C) (2000).

²⁸ See *id.*

²⁹ 17 U.S.C. § 512(c)(3)(iii) (2000); see generally 17 U.S.C. § 512(c)(3) (2000).

this section within the context of the subpoena power in section 512(h). This controversy reached its apex in 2002 when Verizon and the RIAA became the first parties to litigate the subpoena power of the DMCA.³⁰

II. THE VERIZON CASES

A. *Verizon I and Verizon II*

In July 2002 and February 2003, the RIAA served Verizon with subpoenas requesting identifying information of Verizon subscribers who appeared to be trading large numbers of copyrighted music files through P2P file sharing programs.³¹ The RIAA issued the subpoenas pursuant to DMCA section 512(h).³² In addition to the subpoenas, the RIAA provided Verizon with a list of files allegedly downloaded by the users,³³ the users' Internet protocol ("IP") address, a record of "the time and date when the songs were downloaded," and a declaration "that the information was sought in good faith and would only be sued in connection with 'protecting the rights' of RIAA members."³⁴ The RIAA then requested that Verizon disclose "information sufficient to identify the alleged infringer of the material described in the notification to the extent such information is available to the service provider."³⁵

Verizon had the ability to identify the users but refused to enforce the subpoena, arguing that it "relates to material transmitted over Verizon's network, not stored on it, and thus falls outside the scope of the subpoena power authorized in the DMCA."³⁶ The RIAA moved to enforce the first subpoena and on January 21, 2003 Judge Bates of the U.S. District Court for the District of Columbia ordered Verizon to comply with the issued subpoena.³⁷ Verizon appealed and moved to stay the court's order pending resolution

³⁰ See *Verizon I*, 240 F. Supp. 2d at 26 ("The parties, and several amici curiae, agree that this is an issue of first impression of great importance to the application of copyright law to the Internet. Indeed, they concede that this case is presented as a test case on the DMCA subpoena power.").

³¹ RIAA served the first subpoena to Verizon on July 24, 2002 and the second subpoena on February 4, 2003. Both allegations of copyright infringement were based on the users' practice of sharing thousands of music files via peer-to-peer networks such as KaZaA. See *Verizon II*, 257 F. Supp. 2d at 247.

³² See 17 U.S.C. § 512(h) (2000).

³³ See *Verizon I*, 240 F. Supp. 2d at 28 (noting that the RIAA provided Verizon with "a list of more than 600 files . . . allegedly downloaded by the user on one day.").

³⁴ *Id.* (quoting a letter from RIAA executive Whitehead to Verizon executive Crowder dated July 24, 2002). According to the RIAA, the measures it took were in compliance with the provisions set out in section 512(h)(2). See *supra* note 25 and accompanying text.

³⁵ 17 U.S.C. § 512(h)(3) (2000) ("Contents of subpoena").

³⁶ *Verizon I*, 240 F. Supp. 2d at 26.

³⁷ See *id.*

of its appeal.³⁸

While the appeal was pending, the RIAA served Verizon with a second subpoena on February 4, 2003 which Verizon moved to quash.³⁹ Verizon's motion to quash was assigned to Judge Bates because the parties to the actions were the same as during the first subpoena and the legal issues were related.⁴⁰ Both actions were decided in favor of the RIAA on April 14, 2003.⁴¹

1. Statutory Interpretation

In *Verizon I*, Judge Bates found that the subpoena power in 17 U.S.C. section 512(h) applies to all Internet service providers within the scope of the DMCA based "on the language and structure of the statute, as confirmed by the purpose and legislative history."⁴² The RIAA subpoenas do not charge the ISP with claims of infringement; they merely seek the assistance of the ISP in identifying certain subscribers. However, ISP involvement may implicate issues of privacy, and involving Verizon, or any ISP, in this manner may lead to high burdens and costs placed upon ISPs in future online copyright infringement cases.⁴³ Therefore, it is necessary for these and future parties to have a firm understanding of the extent to which the subpoena power in section 512 of the DMCA may be executed.

a. Verizon: The DMCA Subpoena Power is Not Applicable

The section 512(h) subpoena provision refers to a notification that must be presented to an ISP in accordance with section 512(c)(3)(A).⁴⁴ Because of this specific cross-reference, Verizon

³⁸ In its motion for a stay, Verizon asserted constitutional challenges – First Amendment and Article III arguments – as the primary basis for granting a stay. See *Verizon II*, 257 F. Supp. 2d at 247.

³⁹ See *id.* at 248.

⁴⁰ See *id.* at 248 n.4.

⁴¹ See *id.* at 275 (denying Verizon's motion to quash the second subpoena and denying Verizon's request for a stay pending appeal of the first subpoena).

⁴² *Verizon I*, 240 F. Supp. 2d at 26. Section 512 provisions were meant "to limit the liability of Internet service providers for acts of copyright infringement by customers who are using the providers' systems or networks." *Id.* at 27. The limitation on liability applies to "all monetary relief for direct, vicarious and contributory infringement." See S. REP. NO. 105-190, at 20 (1998).

⁴³ Amici briefs filed by various supporters of Verizon's position claim that the steps required by the DMCA in order to issue a subpoena are too lax. "These minimal steps automatically shift the burden to the ISP who receives the subpoena . . . to take steps to protect the customer's anonymity—all in a severely truncated timeframe and generally in a jurisdiction other than the customer's home." Brief of Amici Curiae Alliance for Public Technology et al. at 3, *In re Verizon Internet Servs., Inc., Subpoena Enforcement Matter*, 240 F.Supp.2d 24 (D.D.C. 2003), *Recording Indus. Ass'n of Am. v. Verizon Internet Servs.*, 257 F. Supp. 2d 244 (D.D.C. 2003) (Nos. 03-7015, 03-7053) (consolidated appeals).

⁴⁴ See 17 U.S.C. § 512(h)(2)(A) (2000); 17 U.S.C. § 512(c) (2000) (pertaining to infor-

argues that the subpoena power under section 512(h) should be construed as limited to situations within section 512(c) where allegedly infringing material is stored on the ISP's network.⁴⁵ Verizon only provides its customers with Internet connectivity service and does not store users' material on its system or network. Therefore, Verizon classifies itself as an ISP under subsection (a) of section 512, not under subsection (c), and it is thus outside the subpoena authority of subsection (h).⁴⁶

b. The RIAA: The DMCA Subpoena Power Applies to All Service Providers

The RIAA interprets the DMCA subpoena power to apply to all service providers within the provisions of subsections (a) through (d), and as defined in subsection (k).⁴⁷ Verizon is the type of ISP that benefits from the limitation of liability under Title II and thus, Verizon is the type of ISP that must comply with the subpoena provisions of the same act. Even if the subpoena power is contingent upon the fulfillment of the notification requirements of section 512(c), the RIAA contends that Verizon can fulfill such requirements because it has the ability to disable access to infringing material by terminating the offending subscriber's Internet account.⁴⁸ Alternatively, if a copyright owner cannot satisfy the

mation residing on systems or networks at the direction of users. Subsection 512(h) makes reference to section 512(c)(3), "Elements of notification," when listing the requirements for issuing a subpoena).

⁴⁵ See *Opposition of Verizon Internet Services to Motion to Enforce Ex Parte Subpoena Issued July 24, 2002* at 9-18, *Verizon I*, 240 F. Supp. 2d 24 (Case No. 1:02MS00323); *Verizon II*, 257 F. Supp. 2d at 248. "According to Verizon, a subpoena under the DMCA is 'conditioned' on notification under section 512(c)(3)(A), and that provision is addressed to 'material that resides on a system or network controlled or operated by or for a service provider.'" *Verizon I*, 240 F. Supp. 2d at 29 (quoting a letter written by Verizon Executive Daily to RIAA Executive Whitehead dated Aug. 6, 2002).

⁴⁶ See *Verizon I*, 240 F. Supp. 2d at 26. Section 512(a) gives immunity from copyright infringement to ISPs by reason of "transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections . . ." 17 U.S.C. § 512(a) (2000). Section 512(c) applies to ISPs that store, at the direction of a user, "material that resides on a system or network controlled or operated by or for the service provider . . ." 17 U.S.C. § 512(c)(1) (2000).

⁴⁷ 17 U.S.C. § 512(k)(1) (2000) defines "service provider" as follows:

(A) As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

(B) As used in this section, other than subsection (a), the term "service provider" means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

⁴⁸ Section 512(c) lists the elements of notification required in connection with the re-

requirement of section 512(c)(3)(A)(iii) because the ISP is a mere conduit that cannot identify material to be removed, a notification is still effective under section 512(c)(3)(A) if it “includes substantially” the required information.⁴⁹ The RIAA has, in its estimation, included a substantial part of the notification requirements.⁵⁰

c. The District Court for the District of Columbia: The DMCA Subpoena Provision Applies to Verizon

In round one of the digital disagreement, the U.S. District Court for the District of Columbia accepted the RIAA’s statutory interpretation and rejected Verizon’s arguments by holding “that Verizon’s conduit functions were within the scope of the subpoena authority of section 512(h) of the DMCA.”⁵¹ The main issue before the court was whether the term “service provider,” often referenced in subsection (h), “is limited to one described by subsection (c) or instead includes those described in subsections (a), (b) and (d) of section 512 as well.”⁵² Judge Bates then articulated the section 512(k)(1) definitions of “service provider.” Subsection (k)(1)(A) is a “narrow definition as the term is used solely within subsection (a),” and subsection (k)(1)(B) is a “broader definition governing all other subsections, which specifically includes a ‘service provider’ under subsection (a) as well.”⁵³ After applying the statutory definition of “service provider,” and finding support in the legislative history of the DMCA, Judge Bates was convinced that “the DMCA subpoena authority reaches a subsection (a) service provider such as Verizon contends it is here.”⁵⁴

The court refused Verizon’s dissection of the statute because it found that the language of section 512(h) cannot be isolated from

quest for a subpoena. Section 512(c)(3)(A)(iii) requires the complaining party to identify “the material that is claimed to be infringing or to be the subject of infringing activity and that is to be *removed or access to which is to be disabled*, and information reasonably sufficient to permit the service provider to locate the material.” (emphasis added).

⁴⁹ This basic argument of statutory interpretation is not addressed until *Verizon Appeal*. See *infra* Part III.

⁵⁰ See *supra* note 34 and accompanying text.

⁵¹ *Verizon II*, 257 F. Supp. 2d at 246.

⁵² *Verizon I*, 240 F. Supp. 2d at 30. “This case turns on the meaning and scope of the provisions of the DMCA. ‘As in all statutory construction cases, we begin with the language of the statute.’” *Id.* at 29 (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)).

⁵³ *Id.* at 30.

⁵⁴ The Senate Report explains that “[t]he second definition of ‘service provider,’ set forth

in subsection (j)(1)(B), applies to the term as used in any other subsection of section 512.” S. REP. NO. 105-190, at 54 (subsection (j)(1)(b) ultimately became subsection (k)(1)(B)) . . . “[T]he definition also specifically includes any entity that falls within the first definition of service provider.”

Id. at 31 n.4. (quoting S. REP. NO. 105-190, at 54-55 (1998)).

the Act's structure and purpose and the RIAA's subpoenas must be assessed in that context.⁵⁵ An interpretation like Verizon's would require Congress to have made a clearer intention of such a plan.⁵⁶ The court could find no sound reason why Congress "would enable a copyright owner to obtain identifying information from a service provider storing the infringing material on its system, but would not enable a copyright owner to obtain identifying information from a service provider transmitting the material over its system."⁵⁷

2. The Article III Argument

Having been defeated in the statutory challenge, Verizon then argued that section 512(h) "violates Article III of the Constitution because it authorizes federal courts to issue subpoenas in the absence of a pending case or controversy."⁵⁸ The ISP contends that issuing a subpoena under these circumstances violates Article III because federal judges do not have the authority to issue subpoenas outside the context of an actual case or controversy.⁵⁹

In its Opposition Brief Pending Appeal, the RIAA noted that it is not abnormal for courts to enforce administrative subpoenas unrelated to a pending federal case.⁶⁰ By issuing a subpoena in this case, the court is acting pursuant to 17 U.S.C. section 512(h)(6), which is an express grant of authority from Congress.⁶¹ The RIAA further contends that because Article III does not limit persons who can issue a subpoena, federal courts regularly enforce subpoenas issued by administrative agencies as well as those issued by pri-

⁵⁵ See *Verizon I*, 240 F. Supp. 2d at 26.

⁵⁶ If Congress intended to restrict or limit the subsection (h) subpoena authority based on where the infringing material resides, one would expect to see that limitation spelled out in subsection (h). And if Congress intended to limit subsection (h) subpoenas strictly to service providers under subsection (c), it certainly could have made such a limitation explicit.

See *id.* at 33.

⁵⁷ *Id.* at 35 ("It is unlikely, the Court concludes, that Congress would seek to protect copyright owners in only some of the settings addressed in the DMCA, but not in others."). Judge Bates concluded by noting that "[w]ith copyright legislation such as the DMCA, 'the wisdom of Congress' action . . . is not within [the Court's] province to second guess.'" *Id.* at 44 (quoting *Eldred v. Ashcroft*, 537 U.S. 186 (2003)).

⁵⁸ *Verizon II*, 257 F. Supp. 2d at 248.

⁵⁹ See *id.* at 248.

⁶⁰ Recording Industry Association of America's Opposition to Verizon Internet Services Inc.'s Motion for a Stay Pending Appeal at 11, *In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24 (D.D.C. 2003) (No. 02-MS-0323 (JDB)) [hereinafter RIAA's Opposition to a Stay], available at http://www.riaa.com/news/filings/pdf/verizon/oppositionbrief_pendingappeal.pdf (last visited Apr. 25, 2005).

⁶¹ See *id.* Subsection (h)(6) authorizes the court to issue and deliver the subpoena "to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum." 17 U.S.C. § 512(h)(6) (2000).

vate parties in litigation.⁶²

a. District Court: Section 512(h) Does Not Violate Article III

Ultimately, Judge Bates found Verizon's arguments to be unpersuasive. The court held that section 512(h) "does not place the Article III branch in a role inconsistent with that accorded to it under the Constitution."⁶³ First, having a court clerk issue a section 512(h) subpoena "does not involve either the exercise of judicial power or the exercise by federal judges of Article I or Article II-type investigatory power" and cannot be considered an act of the court.⁶⁴ The clerk exercises no discretion when issuing a subpoena because if the technical requirements are met, then the subpoena must be issued.⁶⁵ Therefore, the clerk's duties are non-discretionary and ministerial.⁶⁶ Judge Bates found that "the Supreme Court has repeatedly distinguished between actions that are ministerial in nature and those that constitute an exercise of judicial, legislative, or discretionary executive power."⁶⁷ The subpoena power of the DMCA directs a clerk, an employee of the judicial branch, to perform a non-discretionary function that involves no Article III judicial power.⁶⁸ Therefore, the court found that section 512(h) "does not place the Article III branch in a role inconsistent with that accorded to it under the Constitution."⁶⁹

3. The First Amendment Argument

Verizon's First Amendment argument is based upon two foundations. First, Verizon argues that if the RIAA's interpretation is correct, the DMCA demands an ISP to pierce a subscriber's anonymity without providing sufficient procedural protection for expressive and associational rights.⁷⁰ This system may lead to grave abuses of the user's privacy. Verizon warns that cyberstalking could

⁶² See RIAA's Opposition for a Stay, *supra* note 60 at 12.

⁶³ *Verizon II*, 257 F. Supp. 2d at 256.

⁶⁴ *Id.* at 249.

⁶⁵ *Id.* ("The clerk, in other words, executes a quintessentially ministerial duty."). Judge Bates found support in the legislative history that suggests that clerks play mainly a ministerial role in the subpoena process. See *id.* at 250-51 ("In fact, the legislative history of § 512(h) indicates that Congress specifically intended the issuance of the subpoena to 'be a ministerial function.'") (quoting S. REP. NO. 105-190, at 51 (1998)).

⁶⁶ A ministerial officer is "[o]ne who performs specified legal duties when the appropriate conditions have been met, but who does not exercise personal judgment or discretion in performing those duties." BLACK'S LAW DICTIONARY 1113 (7th ed. 1999). A ministerial officer is also "[a]n officer who primarily executes mandates issued by the officer's superiors." *Id.*

⁶⁷ *Verizon II*, 257 F. Supp. 2d at 250.

⁶⁸ See *id.*

⁶⁹ *Id.* at 256.

⁷⁰ *Id.* at 257.

be made easier because the subpoena power of the DMCA is accessible to nearly anyone and thus, nearly anyone could easily secure the name, address, and telephone number of a user.⁷¹ Although Verizon admits that there is no First Amendment protection against copyright infringement, its second advance against the DMCA is that it is overbroad and sweeps in expression that may be protected.⁷²

The RIAA rebuts by first disclaiming a First Amendment claim altogether. Because copyright infringement is not protectible, “it is preposterous to suggest that there is anything ‘private’ about the activities of the person whose identity Verizon seeks to hide.”⁷³ The music industry argues that “there is no legitimate expectation of privacy in one’s phone or computer records, especially where a person has opened up his or her computer to the world to break the law.”⁷⁴ Finally, and most convincingly, the RIAA contends that the DMCA is equipped with procedural protections that would exceed the protections suggested by the courts cited in Verizon’s motion.⁷⁵

a. District Court: Section 512(h) Does Not Violate the First Amendment

Finding that section 512(h) does not violate the First Amendment, Judge Bates began by recognizing Verizon’s standing to assert the First Amendment rights of its subscribers.⁷⁶ He then agreed that the First Amendment protects anonymous speech and that protection extends to anonymous expression on the Internet.⁷⁷ However, “when the Supreme Court has held that the First Amendment protects anonymity, it has typically done so in

⁷¹ See Verizon Internet Services Inc.’s Brief in Support of its Motion to Quash February 4, 2003 Subpoena and Addressing Questions Propounded by the Court on March 7, 2003 at 27, *RIAA v. Verizon Internet Servs.*, 257 F. Supp. 2d 244 (D.D.C. 2003) (No. 03-MS-0040 (JDB)) [hereinafter Verizon’s Brief in Support of its Motion to Quash], available at http://www.eff.org/legal/cases/RIAA_v_Verizon/20030318_final_second_subpoena_brief.pdf (last visited Apr. 25, 2005). Verizon warns that “this threat to privacy, and even personal safety, will substantially chill speech and association on the Internet.” *Id.* at 28.

⁷² See *id.* at 24-25 (“Section 512(h) provides no such built-in protection for expression that may very well be, following adjudication of the merits, found to be fully protected speech that is not (or cannot be) restricted by copyright laws. This is the First Amendment issue at the heart of the action.”).

⁷³ RIAA’s Opposition to a Stay, *supra* note 60 at 10 (“First, Verizon has never identified the source of the supposed privacy or other interests at stake in this case. They do not derive from the Constitution or the DMCA.”).

⁷⁴ *Id.*

⁷⁵ *Id.* at 11 (“Thus, even if the Court applied the very legal test that Verizon and its amici advocate, it still would result in enforcement of the subpoena.”).

⁷⁶ See *Verizon II*, 257 F. Supp. 2d at 257.

⁷⁷ *Id.* at 258.

cases involving core First Amendment expression” (i.e., political speech).⁷⁸ The DMCA does not directly impact core First Amendment expression, “and thus may not warrant the type of ‘exacting scrutiny’ reserved for that context.”⁷⁹ Although there is no First Amendment protection against copyright infringement, the court recognized the necessity for some level of First Amendment protection for anonymous speech in this instance.⁸⁰ This protection is found in the procedural safeguards embodied throughout Title II of the DMCA.⁸¹

First, the court pointed out that the DMCA “does not regulate protected expression or otherwise permit prior restraint of protected speech” because it “only requires production of the identity of one who has engaged in unprotected conduct—sharing copyrighted material on the Internet.”⁸² Judge Bates went through the provisions of section 512(h) to illustrate that those provisions are themselves procedural safeguards.⁸³ In response to Verizon’s cyberstalking concerns, the fact that the statute contains an important disincentive for false representations under section 512(f)⁸⁴ is protection against abusive or harassing subpoenas.⁸⁵ The Court found that section 512 “provide[s] sufficient safeguards or judicial supervision to protect Internet users’ First Amendment rights, including anonymity.”⁸⁶

III. VERIZON’S APPEAL

On appeal, Verizon argued that the district court’s orders should be reversed for three alternative reasons:

- (1) [Section] 512(h) does not authorize the issuance of a sub-

⁷⁸ *Id.* at 259.

⁷⁹ *Id.* at 260 (“Section 512(h) deals strictly with copyright infringement . . . the ‘Supreme Court . . . has made it unmistakably clear that the First Amendment does not shield copyright infringement.’”) (quoting *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 220 (S.D.N.Y. 2000)).

⁸⁰ *See id.* (concluding that “for present purposes there is some level of First Amendment protection that should be afforded to anonymous expression on the Internet, even though the degree of protection is minimal where alleged copyright infringement is the expression at issue.”).

⁸¹ *See id.*; *see also infra* Part VII.B.

⁸² *Verizon II*, 257 F. Supp. 2d at 261.

⁸³ For an analysis of the section 512 procedural safeguards, *see supra* Part I.

⁸⁴ 17 U.S.C. § 512(f) (2000) assigns liability to “[a]ny person who knowingly materially misrepresents under this section (1) that material or activity is infringing or (2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages”

⁸⁵ *See Verizon II*, 257 F. Supp. 2d at 261. Section 512(f) states in part, “any person who knowingly materially misrepresents . . . shall be liable for damages.” 17 U.S.C. § 512(f) (2000).

⁸⁶ *Verizon II*, 257 F. Supp. 2d at 264.

poena to an ISP acting solely as a conduit for communications the content of which is determined by others; if the statute does authorize such a subpoena, then the statute is unconstitutional because (2) the district court lacked Article III jurisdiction to issue a subpoena with no underlying “case or controversy” pending before the court; and (3) § 512(h) violates the First Amendment because it lacks sufficient safeguards to protect an Internet user’s ability to speak and to associate anonymously.⁸⁷

Again, the RIAA asserted that section 512(h) applies to an ISP acting as a conduit for transferring data between two Internet users, such as P2P file sharing, and defended the constitutionality of the subpoena clause.⁸⁸

The United States Court of Appeals for the District of Columbia agreed with Verizon’s interpretation of the statute and reversed the orders of the district court solely on these grounds.⁸⁹ The court based its reversal on a finding that the terms and overall structure of section 512 require that “a subpoena may be issued only to an ISP engaged in storing on its servers material that is infringing or the subject of infringing activity.”⁹⁰ In other words, the court adopted Verizon’s argument by finding that a subpoena may not be issued to an ISP that acts as a mere conduit for communications between two Internet users.⁹¹

The RIAA maintains the decisions put forth at the district court level.⁹² It also renews its argument that an ISP is capable of disabling access to infringing material, as mandated by section 512(c)(3)(A)(iii), because it can terminate the offending subscriber’s Internet account. Alternatively, if an ISP cannot satisfy section 512(c)(3)(A)(iii), a notification is still valid as long as it “includes substantially” the required information listed in section 512(c)(3)(A).⁹³

⁸⁷ *Verizon Appeal*, 351 F.3d at 1231.

⁸⁸ *Id.* at 1233.

⁸⁹ Although the U.S. Court of Appeals did not address the constitutional arguments, they may be important to the future of this litigation and are therefore discussed in Part V and Part VI of this Comment.

⁹⁰ *Verizon Appeal*, 351 F.3d at 1233.

⁹¹ *See id.*

⁹² *See id.* The lower court based its decision on the statutory text and structure as well as legislative intent. “In short, Verizon’s position that the subpoena power in subsection (h) only applies to subsection (c) service providers, and not to subsection (a) (or for that matter to subsections (b) and (d)) service providers, would create a huge loophole in Congress’s effort to prevent copyright infringement on the Internet.” *Verizon I*, 240 F. Supp. 2d at 35.

⁹³ *See Verizon Appeal*, 351 F.3d at 1233. The RIAA maintains that § 512(c)(3)(A) is satisfied because “the ISP can identify the infringer based upon the information provided by the copyright owner pursuant to §§ 512(c)(3)(A)(i)-(ii) and (iv)-(vi).” *Id.* at 1236.

A. *The Circuit Court of Appeals Reversed the Lower Court: The DMCA Subpoena Power Applies to Section 512(c) Service Providers*

Before reversing the lower court's findings, Judge Ginsburg of the Circuit Court of Appeals for the District of Columbia began his analysis by dissecting the connection between sections 512(h) and 512(a)-(d). In particular, the court outlined the context in which the term "service provider" was being used in safe harbor subsections (a)-(d) of section 512.

These provisions aim to protect ISPs functioning in four different capacities from the threat of copyright infringement. While an ISP acting in these capacities may not be held liable for copyright infringement, an ISP customer, the active infringer, may be. Because section 512(h) makes reference to section 512(c)(3)(A), Verizon argues that subsection (h) applies only to those ISPs referenced in subsection (c).⁹⁴ Since Verizon is an ISP acting as a conduit for users engaged in the transient activity of P2P file sharing, it is unable to fulfill the requirements of section 512(c)(3)(A) and therefore not subject to the subpoena provision at all.⁹⁵ The Court of Appeals for the District of Columbia agreed that:

[Section] 512(h)(4) makes satisfaction of the notification requirement of section 512(c)(3)(A) a condition precedent to issuance of a subpoena: "If the notification filed satisfied the provisions of [§ 512](c)(3)(A)" and the other content requirements of § 512(h)(2) are met, then "the clerk shall expeditiously issue and sign the proposed subpoena . . . for delivery" to the ISP.⁹⁶

Because infringing material obtained or distributed via P2P file sharing is located in the computer of an individual user instead of an ISP's server, an ISP cannot "remove" or "disable access to" the infringing material.⁹⁷

The court was also unconvinced by the RIAA's argument that its notification is effective pursuant to section 512(c)(3)(A) because it "includes substantially" the required information.⁹⁸ Noting that the Act itself does not shed light on how the term "includes substantially" should be interpreted, the court relied on

⁹⁴ *Verizon Appeal*, 351 F.3d at 1235. This is the same argument put forth by Verizon at the district court level. See *supra* Part II.A.1.

⁹⁵ See *Verizon Appeal*, 351 F.3d at 1235.

⁹⁶ *Id.* (quoting 17 U.S.C. § 512(h)(4) (2000)). (alterations in original).

⁹⁷ *Id.* (noting that "Verizon can not [sic] remove or disable one user's access to infringing material resident on another user's computer because Verizon does not control the content on its subscribers' computers."). *Id.*

⁹⁸ *Id.* at 1237.

the Senate and House Reports for insight. These reports indicate that “includes substantially” means that a notification that is otherwise complete under section 512(c)(3)(A) will not be ineffective for “technical errors.”⁹⁹ The Court of Appeals did not think that the RIAA’s defect in notification qualified as a mere technical error, nor did it consider it “insubstantial.”¹⁰⁰

Accordingly, the court remanded the case to the district court with instructions to “vacate its order enforcing the July 24 subpoena and to grant Verizon’s motion to quash the February 4 subpoena.”¹⁰¹ This decision may have been an initial blow to the RIAA’s effort to stop online music copyright infringement, but the organization has found another way to pursue its initial goal.¹⁰² However, because exercise of the DMCA subpoena power has only been litigated in a few courts, it is useful to examine the parties’ arguments in further depth.¹⁰³

IV. STATUTORY INTERPRETATION OF DMCA SECTION 512(h)

The RIAA’s interpretation of the DMCA suggests that the statute was created to benefit copyright owners.¹⁰⁴ Verizon’s position

⁹⁹ See *id.* at 1236 (finding that the Senate and House Reports “state the term [‘includes substantially’] means only . . . ‘technical errors . . . such as misspelling a name’ or ‘supplying an outdated area code’”) (quoting S. REP. NO. 105-190, at 47 (1998); H.R. REP. NO. 105-551 (II), at 56 (1998)).

¹⁰⁰ See *id.*

¹⁰¹ *Id.* at 1239.

¹⁰² The RIAA has continued the fight against copyright infringement by filing thousands of John Doe actions since the Verizon appeal in December 2003. See, e.g., John Borland, *RIAA Steps Up File-Trading Suits*, CNET News.com (Feb. 17, 2004), at <http://news.com.com/2100-1027-5160262.html> (last visited Apr. 25, 2005); Frank Ahrens, *A Reprise of Lawsuits Over Piracy; Music Industry Lacks Defendants’ Names*, Washingtonpost.com (Jan. 22, 2004), at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A36795-2004Jan21¬Found=true> (last visited Apr. 25, 2005); Grant Gross, *RIAA Says It Will Continue Fight, Despite Subpoena Ruling*, Computerworld.com (Dec. 19, 2003), at <http://www.computerworld.com/governmenttopics/government/legalissues/story/0,10801,88444,00.html> (last visited Apr. 25, 2005); see also *infra* Part VIII for a discussion of John Doe litigation.

¹⁰³ The RIAA also attempted to implement the DMCA subpoena power against an ISP in the Eighth Circuit. In *In re Charter Communications, Inc.*, a majority of the U.S. Court of Appeals for the Eighth Circuit found in favor of the ISP on similar grounds as the court in *Verizon Appeal*. The dissent echoed reasoning similar to that of Judge Bates in *Verizon I*. In *re Charter Communications, Inc.*, 393 F.3d 771 (8th Cir. 2005) (Murphy, J. dissenting). The RIAA’s first petition for writ of *certiorari* to the U.S. Supreme Court was denied in October 2004, but another petition for *certiorari* may be necessary as the confusion caused by the DMCA continues to add complexity to the digital debate. See Recording Indus. of Am., Inc. v. Verizon Internet Servs., Inc., 125 S. Ct. 309 (2004) (*cert. denied*).

¹⁰⁴ Judge Bates thought the DMCA was a tool that would benefit the public by allowing copyright owners to make their works available online with the confidence of legal protection against infringement. See *Verizon I*, 240 F. Supp. 2d at 37 (noting that this result was “driven by the observation [of Congress] that unless copyright owners have the ability to protect their copyrights on the Internet, they will be less likely to make their works available online . . .”).

assumes that a principal purpose of the Act was to limit ISP liability for online copyright infringement.¹⁰⁵ A basic textual interpretation of the statute would allow both views to prove true.

A. *The Statute Defines “Service Provider” Broadly*

The term “service provider” is used frequently throughout the DMCA and is specifically mentioned seven times in section 512(h).¹⁰⁶ Section 512(k) offers a narrow definition of service provider and a broad one.¹⁰⁷ While the narrow definition in section 512(k)(A) limits the meaning of “service provider” to the one used in section 512(a), the broader definition in section 512(k)(B) encompasses all types of service providers, *including* those described in section 512(a).¹⁰⁸ Applying the statutory definition of “service provider” to section 512(h) necessarily means that this subpoena provision applies to all service providers – not just to those specified in section 512(a), and therefore also applies to Verizon.¹⁰⁹

Even if section 512(h) did only apply to subsection (c) ISPs, copyright owners may still be able to issue valid subpoena requests. The notification requirement of section 512(c)(3)(A) begins by stating that the written communication to the service provider must “include *substantially* the following”¹¹⁰ The “following list” includes “[i]dentification of the material that is claimed to be infringing . . . and that is to be removed or access to which is to be disabled”¹¹¹ Peer-to-peer networks do not require the copyrighted material to be stored on the ISP’s system and therefore, there is no material that can be removed from Verizon’s network.

¹⁰⁵ *See id.*

¹⁰⁶ *See* 17 U.S.C. § 512(h) (2000); *see also Verizon I*, 240 F. Supp. 2d at 30 (citing several contexts in which the term “service provider” is used in subsection (h)).

¹⁰⁷ *See supra* note 47.

¹⁰⁸ 17 U.S.C. § 512(k)(1)(B) (2000) states: “As used in this section, other than subsection [512](a), the term ‘service provider’ means a provider of online services or network access, or the operator of facilities therefore, and includes an entity described in subparagraph [512(k)(1)](A).”

¹⁰⁹ Under section 512(h)(2)(A), a request for subpoena must include a notification described in subsection (c)(3)(A). Section 512(c)(3)(A) states that “[t]o be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following” and goes on to list six elements of notification. *See supra* Part I; *see also* Reply Brief for Appellant at 13, *RIAA v. Verizon Internet Servs.*, 257 F. Supp. 2d 244 (D.D.C. 2003) (Nos. 03-7015, 03-7053) (“By Statutory Cross-Reference and Context, the Scope of Section 512(h) Is Limited to the Functions Described in Section 512(c).”), *available at* http://www.eff.org/legal/cases/RIAA_v_Verizon/20030717_verizon_reply_brief.pdf (last visited Apr. 25, 2005).

¹¹⁰ 17 U.S.C. § 512(c)(3)(A) (2000) (emphasis added).

¹¹¹ 17 U.S.C. § 512(c)(3)(A)(iii) (2000). Verizon argues that the RIAA cannot fulfill the requirements of the notification because it cannot identify material that must be removed from the network.

However, copyright owners can fulfill the subpoena requirements of section 512(h) because the notification must only *substantially* provide the elements listed in section 512(c)(3)(A).

In *Verizon Appeal*, the Court of Appeals correctly found that there is nothing in the Act to suggest what the phrase “include substantially” means or how it should be interpreted.¹¹² The court then held that “the defect in the RIAA’s notification is not a mere technical error; nor could it be thought ‘insubstantial’”¹¹³ However, even if Congress intended the phrase “include substantially” to apply to technical errors, it went on to confirm that the most important aspect of subsection (c)(3) was to identify the alleged infringer. “The Committee expects that the parties will comply with the functional requirements of the notification provisions such as providing sufficient information so that a designated agent or the complaining party submitting a notification may be contacted efficiently.”¹¹⁴ The information the RIAA supplied to the ISPs is enough to identify a subscriber with relative ease.¹¹⁵ Thus, the information in the RIAA subpoenas includes substantially what is necessary for compliance with section 512(c)(3)(A).

B. If Congress Wanted Section 512(h) to Apply Only to Section 512(c) Internet Service Providers, it Would have Stated this Intent Explicitly

Congress did not intend to limit or restrict the application of section 512(h) because if it had, it would have done so explicitly. First, section 512(h) is entitled, “Subpoena to identify infringer.” The title alone does not qualify an infringer as one using a specific type of service provider, nor does it specifically make reference to infringement relating to subsection (c) only.¹¹⁶

Again, Title II of the DMCA includes provisions that act as safe harbors to immunize ISPs from liability for copyright infringement under specific conditions. This fact should weigh in the RIAA’s favor because the provisions focus on the ISP’s culpability for copy-

¹¹² See *Verizon Appeal*, 351 F.3d at 1236. The Senate Report states that the “Committee intends that the substantial compliance standard in subsections (c)(2) and (c)(3) be applied so that technical errors (such as misspelling a name, supplying an outdated area code . . .) do not disqualify service providers and copyright owners from the protections afforded under subsection (c).” S. REP. NO. 105-190, at 47 (1998).

¹¹³ *Verizon Appeal*, 351 F.3d at 1236.

¹¹⁴ S. REP. NO. 105-190, at 47 (1998).

¹¹⁵ Several ISPs that received subpoenas from the RIAA were able to and actually did identify and contact the subscribers described on the subpoena. See Kevin Fitchard, *SBC, Verizon Counterpunch in Battle Over User Privacy*, Telephony Online Magazine (Sep. 22, 2003), available at <http://www.keepmedia.com/ShowItemDetails.do?itemID=277187&ex-ID=10030> (last visited Apr. 25, 2005).

¹¹⁶ See *Verizon I*, 240 F. Supp. 2d at 33.

right infringement. The culpability of an ISP's customer is not addressed until the subpoena provision of subsection (h). It cannot be assumed that Congress intended to make safe harbor provisions for all kinds of ISPs, but intended only to require subpoena compliance from one type of ISP – those that store information on their networks. Neither Verizon, nor the courts, have provided reasons why such a distinction would be made. In reference to this argument, Judge Bates concluded, “if Congress intended to limit subsection (h) subpoenas strictly to service providers under subsection (c), it certainly could have made such a limitation explicit.”¹¹⁷

V. SUBPOENAS ISSUED PURSUANT TO THE DMCA DO NOT VIOLATE ARTICLE III OF THE UNITED STATES CONSTITUTION

A subpoena issued pursuant to section 512(h) of the DMCA does not violate Article III of the United States Constitution. Under Article III, the power of the federal judiciary extends to all cases and controversies arising under the U.S. Constitution.¹¹⁸ Verizon contends that section 512(h) is unconstitutional because it authorizes federal courts to act as investigators in the absence of an actual case or controversy.¹¹⁹ The subpoenas under section 512(h) were issued in the name of the court, so they “carry with them enforcement authority that federal courts derive only from Article III of the Constitution.”¹²⁰ In his opinion, Judge Bates refuted very thoroughly and comprehensibly Verizon's contentions.¹²¹

Section 512(h) cannot violate Article III because it cannot be considered an act of the court. If the notification of claimed infringement satisfies subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, then the clerk shall expeditiously issue and sign the subpoena.¹²² Pursuant to this subsection, “the clerk exercises no dis-

¹¹⁷ *Id.* at 33.

¹¹⁸ *See* U.S. CONST. art. III, § 2.

¹¹⁹ *See* Reply Brief for Appellant at 2, *RIAA v. Verizon Internet Servs.*, 257 F. Supp. 2d 244 (D.D.C. 2003) (Nos. 03-7015, 03-7053) (citing *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851); and *United States v. Morton Salt Co.*, 338 U.S. 632 (1950)).

¹²⁰ *See* *Verizon Internet Servs., Inc.'s Brief in Support of its Motion to Quash February 4, 2003 Subpoena and Addressing Questions Propounded by the Court on March 7, 2003 at 27*, *RIAA v. Verizon Internet Servs.*, 257 F. Supp. 2d 244 (D.D.C. 2003) (No. 03-MS-0040 (JDB)), available at http://www.eff.org/legal/cases/RIAA_v_Verizon/20030318_final_second_subpoena_brief.pdf (last visited Apr. 25, 2005).

¹²¹ *See* *Verizon II*, 257 F. Supp. 2d at 248-57. “[U]pon examination, it is clear that the section 512(h) subpoena authorization does not represent an innovation that is inconsistent with the limited role of the judiciary as it has traditionally been understood in our constitutional regime.” *Id.* at 257.

¹²² 17 U.S.C. § 512(h)(4) (2000).

cretion; if the requirements are met, the subpoena must be issued.”¹²³ In order for the subpoena power to be effective, Congress intended the issuance of the subpoena to “be a ministerial function.”¹²⁴ As the court found in *Verizon II*, the duties of the clerk are non-discretionary and do not implicate Article III judicial power or involve federal judges in investigatory roles.¹²⁵

VI. THE FIRST AMENDMENT’S GRANT OF FREEDOM OF SPEECH ENCOMPASSES THE RIGHT TO SPEAK ANONYMOUSLY

The right to freedom of speech under the First Amendment encompasses the right to speak anonymously.¹²⁶ In *Talley v. California*, the first U.S. Supreme Court case to link anonymity with freedom of speech, the Court was faced with a Los Angeles ordinance that required all distributed handbills to include the names and addresses of the author or publisher and distributor.¹²⁷ The ordinance was against existing public policy because it put a restriction on freedom of speech by requiring individuals to disclose their identities on political propaganda. The Court noted that “[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.”¹²⁸ The Court held this statute unconstitutional and found that “such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression.”¹²⁹

Thirty-five years later in *McIntyre v. Ohio Elections Commission*,¹³⁰ the Supreme Court expanded the *Talley* holding when it declared that “[t]he freedom to publish anonymously extends beyond the literary realm.”¹³¹ Faced again with a state statute barring distribution of anonymous handbills, the Court upheld the defendant’s

¹²³ See *Verizon II*, 257 F.Supp.2d at 249.

¹²⁴ The issuing of the order should be a ministerial function performed quickly for this provision to have its intended effect. After receiving the order, the service provider shall expeditiously disclose to the copyright owner or its agent the information required by the order to the extent that the information is available to the service provider, regardless of whether the service provider responds to the notification of claimed infringement.

S. REP. NO. 105-190, at 51 (1998).

¹²⁵ See *Verizon II*, 257 F. Supp. 2d at 256.

¹²⁶ See *Talley v. California*, 362 U.S. 60 (1960).

¹²⁷ See *id.* at 61 (noting that the anonymous handbills at issue contained a plea for the public to boycott named merchants because they did not participate in equal opportunity employment practices).

¹²⁸ *Id.* at 64.

¹²⁹ *Id.*

¹³⁰ 514 U.S. 334 (1995).

¹³¹ *Id.* at 342.

right to anonymously distribute election material and declared that the author of a work is generally free to remain anonymous despite the public's interest in identifying the creator of the work.¹³² Whether the decision for an author to remain anonymous is motivated by fear of retaliation, by want of privacy, or "by concern about social ostracism . . . at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry."¹³³ The Court went on to say that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."¹³⁴ These cases, and many in between, solidify a citizen's right to speak anonymously. However, these cases and those in between also illustrate the contextual pattern in which anonymous speech will be protected.

A. *The First Amendment Right to Speak Anonymously Extends to Communication Over the Internet*

The First Amendment right to speak anonymously extends to communication over the Internet, but like real-space communications, this right extends only to certain contexts of speech. The two leading Supreme Court cases that uphold the right to speak anonymously both deal with speech distributed by leaflet or pamphlet.¹³⁵ In another case involving anonymous speech, the Supreme Court analogized a speaker on the Internet to the modern-day equivalent of a pamphleteer.¹³⁶ In *ACLU v. Reno*, the Court noted that "[t]hrough the use of [online] chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."¹³⁷ In *Talley* and *McIntyre*, actual pam-

¹³² See *id.* at 341. The Court also noted that "[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *Id.* at 357. This case and others confirming the First Amendment right to anonymous speech may in fact be more helpful to the RIAA's case than Verizon's because the content of the anonymous communication was political, informational, or editorial and did not involve claims of copyright infringement.

¹³³ *Id.* at 342.

¹³⁴ *Id.*

¹³⁵ See *id.* at 337, 357 (holding unconstitutional a state law prohibiting distribution of anonymous campaign literature, which had been applied to the distribution of leaflets at a public school meeting); *Talley*, 362 U.S. at 65-66 (holding unconstitutional a state law prohibiting distribution of anonymous handbills).

¹³⁶ See *Reno v. ACLU*, 521 U.S. 844 (1997).

¹³⁷ *Id.* at 870.

phleteers were afforded the highest degree of First Amendment protection by being granted the right to distribute political handbills anonymously. By comparing an Internet user to a pamphleteer, the Court in *ACLU* appears to have extended the same high level of First Amendment protection to communication on the Internet.¹³⁸

Some lower federal courts have also extended the right to speak anonymously to Internet speech because “Internet anonymity facilitates the rich, diverse, and far-ranging exchange of ideas.”¹³⁹ These courts also agree that people who have committed no wrongdoing should be free to participate in online forums without fear that their identity will be exposed under the authority of the court.¹⁴⁰

1. The First Amendment Right to Speak Anonymously Does Not Extend to Verizon Users Engaged in Copyright Infringement Over the Internet

While people have the right to speak anonymously on the Internet as discussed above, the right does not protect those involved in wrongdoing, such as copyright infringement. Verizon asserts that complying with a section 512(h) subpoena will necessarily violate the First Amendment rights of its subscribers because its users “have a right to speak, listen, and associate anonymously.”¹⁴¹ It also argues that the Supreme Court has found built-in First Amendment accommodations in copyright law and that such accommodations are absent in section 512(h).¹⁴² Neither of Verizon’s

¹³⁸ See Non-Party Infospace, Inc.’s Memorandum in Response to Motion of J. Doe to Quash Subpoena Issued to Silicon Investor/Inospace, Inc., *In re 2theMart.com, Inc. Securities Litigation*, 114 F. Supp. 2d 955 (C.D. Cal. 2000) (No. MS01-016), available at: <http://www.cyberslapp.org/litigation/briefs/InfoSpaceBrief2.pdf> (last visited Apr. 25, 2005).

¹³⁹ *John Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001).

¹⁴⁰ See *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (“The ability to speak one’s mind on the Internet without the burden of the other party knowing all the facts about one’s identity can foster open communication and robust debate.”).

¹⁴¹ Verizon’s Brief in Support of its Motion to Quash, *supra* note 71 at 19. One problem that prevents Verizon and the RIAA from owning clear First Amendment arguments is that the issue of anonymity comes only at the point of allegations of copyright infringement. Verizon refused to honor the RIAA’s subpoenas partly because its subscribers were not copyright infringers, but *alleged* copyright infringers. If a later court found that the subscriber was not an infringer, then his identity would have been made public, perhaps to his great expense. “By design, at the time section 512(h) is invoked, there has been no judicial determination of copyright infringement . . . the filings required by section 512(h) fall far short of meeting even the notice pleading requirements for *alleging* a case of copyright infringement.” *Id.* (emphasis included).

¹⁴² See *id.* at 24 (citing *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003)). “Section 512(h) provides no such built-in protection for expression that may very well be, following adjudication of the merits, found to be fully protected speech that is not (or cannot be) restricted by the copyright laws.” *Id.* at 24-25.

arguments prevail because section 512 does provide sufficient safeguards to protect Internet users' First Amendment rights.¹⁴³

Thus far, the cases extending the First Amendment right to anonymous speech have dealt primarily with the distribution of written communication. The Court in *McIntyre* specifically noted that it was dealing with "only written communications and, particularly, [political] leaflets of the kind the defendant distributed."¹⁴⁴ Because these cases find in favor of anonymous speech in the contexts of political speech and social commentary, this precedent tends to go against extending anonymity to Internet users under the DMCA. The RIAA seeks the identities of Verizon subscribers who have misappropriated the rights and goods of its members. These users are not making a political statement, as in *McIntyre*,¹⁴⁵ nor are they encouraging a boycott of a certain merchant, as in *Talley*.¹⁴⁶ "To be sure, this is not a case where Verizon's customer is anonymously using the Internet to distribute speeches of Lenin, Biblical passages, educational materials, or criticisms of the government—situations in which assertions of First Amendment rights more plausibly could be made."¹⁴⁷ Therefore, the users whom the RIAA seeks to identify are not a class of individuals entitled to First Amendment protection for anonymity.

VII. COURTS TRADITIONALLY USE A BALANCING TEST TO DETERMINE WHETHER AN INDIVIDUAL'S IDENTITY MAY BE DISCLOSED

Courts traditionally use a balancing test to determine whether to protect a person's anonymity; however, there is very little, if any, persuasive authority for courts to turn to when dealing with Internet anonymity in connection with the subpoena power of the DMCA. When faced with a subpoena to identify an alleged defamer, the court in *Doe v. 2theMart.com* had the task of determining "when and under what circumstances a civil litigant will be permitted to obtain the identity of persons who have exercised their First Amendment right to speak anonymously."¹⁴⁸ In doing so, the

¹⁴³ See *Verizon II*, 257 F. Supp. 2d at 257-68.

¹⁴⁴ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

¹⁴⁵ See *id.*

¹⁴⁶ See *Talley v. California*, 362 U.S. 60 (1960).

¹⁴⁷ *Verizon I*, 240 F. Supp. 2d at 43 ("As the Supreme Court explained in *Watchtower Bible & Tract Society*, the purpose of protecting anonymous expression is to safeguard those 'who support causes anonymously' and those who 'fear economic or official retaliation,' 'social ostracism,' or an unwanted intrusion into 'privacy.'") *Id.* (citing *Watchtower Bible & Tract Society*, 536 U.S. 150, 166 (2002)).

¹⁴⁸ *2TheMart.com* involved a claim of online defamation, so the subpoena in this case was a civil subpoena issued pursuant to Rule 45 of the Federal Rules of Civil Procedure. The

court considered a procedure that other courts have turned to when deciding when to protect an individual's First Amendment rights to anonymity – a balancing test.¹⁴⁹

In 1999, the District Court of Northern California introduced a balancing test in an Internet trademark infringement case, *Columbia Insurance Co. v. Seescandy.com*.¹⁵⁰ In that case, the plaintiff was unable to identify the defendants when filing the complaint, so it named J. Doe as the defendants and alleged, *inter alia*, the infringement of a registered trademark when those defendants registered the “Seescandy.com” domain name.¹⁵¹ Because the allegedly tortious conduct was completely anonymous and occurred online, the court had to consider whether it was necessary to uncover the identity of the defendants so that they might be properly served and subject to the jurisdiction of the court.¹⁵² In doing so, the court recognized that the defendant had a “legitimate and valuable [First Amendment] right to participate in online forums anonymously.”¹⁵³ Accordingly, the court ruled that four limiting principles would apply to such discovery.

A. A First Amendment Balancing Test

The four limiting principles employed by the court in *Seescandy.com* evolved into a balancing test. The aim of the balancing test was to create safeguards that would ensure the future protection of an individual's right to anonymity by only granting discovery for identity purposes in rare cases and thus, preventing the use of John Doe suits as a method of harassment and intimidation.¹⁵⁴ The first prong of the test demanded the inquiring party to “identify the missing party with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court.”¹⁵⁵ Then, the inquiring party should “identify all previous steps taken to locate the elusive defendant.

DMCA was not applicable because the claim was not one of copyright infringement. See *2theMart.com*, 140 F. Supp. 2d at 1093-94; FED. R. Civ. P. 45.

¹⁴⁹ See *2theMart.com*, 140 F. Supp. 2d at 1095.

¹⁵⁰ 185 F.R.D. 573, 578 (N.D. Cal. 1999).

¹⁵¹ See *id.* at 576.

¹⁵² See *id.* at 578.

¹⁵³ *Id.* at 578.

¹⁵⁴ See *id.* Verizon argues that the DMCA, as constructed, leaves Internet users vulnerable to bad faith invasions of privacy. See Verizon's Brief in Support of its Motion to Quash, *supra* note 71. However, Verizon also argued that subpoenas issued pursuant to John Doe lawsuits, as opposed to being issued under the DMCA, would be a way to legally and constitutionally maintain the privacy of Internet users. Verizon won this argument in *Verizon Appeal*, however privacy advocates still argue that John Doe lawsuits may not be the solution. See *infra* Part VIII.

¹⁵⁵ *Seescandy.com*, 185 F.R.D. at 578.

This element is aimed at ensuring that plaintiffs make a good faith effort to comply with the requirements of service of process and specifically identify defendants.”¹⁵⁶ Next, the inquiring party should establish, to the Court’s satisfaction, that plaintiff’s suit against defendant could withstand a motion to dismiss.¹⁵⁷ Finally, the plaintiff should file a request for discovery of the defendant’s identification with the court, “along with a statement of reasons justifying the specific discovery requested as well as identification of a limited number of persons or entities on whom discovery process might be served and for which there is a reasonable likelihood that the discovery process will lead to identifying information.”¹⁵⁸ Several trial courts have applied such a test, with slightly different variations, when deciding whether the identifying information of an anonymous online speaker should be revealed.¹⁵⁹ These balancing factors are equivalent to, if not less demanding than, the DMCA procedural safeguards.

B. *The DMCA Contains Procedural Safeguards*

Those opposed to the subpoena power of the DMCA¹⁶⁰ argue that it violates the First Amendment because the freedom of speech also provides for the freedom to speak anonymously.¹⁶¹ Verizon’s position is that section 512(h) of the DMCA contains no procedural safeguards resembling those found in a court’s balancing test.¹⁶² This absence of a defined standard creates serious pri-

¹⁵⁶ *Id.*

¹⁵⁷ *See id.*

¹⁵⁸ *Id.* at 580.

¹⁵⁹ *See* Non-Party Infospace, Inc.’s Memorandum in Response to Motion of J. Doe to Quash Subpoena Issued to Silicon Investor/Infospace, Inc., *supra* note 138; *see also* Varian Med. Sys., Inc. v. Delfino, et al., Case No. CV 780187 (Cal. Super. Ct., Santa Clara Co., March 7, 2001) (granting Does’ motion to quash a subpoena seeking identity of anonymous online speakers where party issuing the subpoena failed to show a compelling need for the information that outweighed the speakers’ constitutional rights to free speech and privacy); Dendrite Intern., Inc. v. Doe No. 3, 445 A.2d 756 (2001) (no discovery into Does’ identity allowed where plaintiff failed to prove that anonymous online speakers used their constitutional right to speak anonymously in a manner that was unlawful or that would warrant the court to revoke their constitutional protections, following the *Columbia Ins. Co.* four-part test); *In re* Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26, 36 (2000) (adopting the two-part test that plaintiff must meet prior to obtaining discovery into the identity of an anonymous online speaker).

¹⁶⁰ Opponents who wrote amici briefs in support of Verizon’s position include the American Civil Liberties Union (ACLU), Alliance for Public Technology, Electronic Frontier Foundation (EFF), Media Access Project, and others. These briefs and others can be found at and downloaded from Verizon’s website at <http://newscenter.verizon.com/kit/riaa/support1.vtml> (last visited Apr. 25, 2005).

¹⁶¹ *See supra* Part VI; *see also* Talley v. California, 362 U.S. 60, 65-66 (1960) (holding that an ordinance barring the distribution of anonymous handbills under any circumstances was void as abridging freedom of speech and of press).

¹⁶² *See* Reply Brief for Appellant, *supra* note 109 at 19.

vacy implications and due process concerns. Critics of the subpoena clause point out that “[i]t opens the door for any person claiming to own a copyright to submit a one-page form to a clerk of a court and obtain the unlimited ability to collect private subscriber information” and calls for legislative action from Congress.¹⁶³ However, Judge Bates was correct when he found that section 512(h) of the DMCA does contain the necessary procedural safeguards to protect freedom of speech and therefore does not violate the First Amendment.¹⁶⁴

Balancing tests are similar to the codified subpoena process in the DMCA. For instance, “courts often require the plaintiff to describe the unknown defendant sufficiently to ensure that they are a legally accountable person or entity.”¹⁶⁵ The DMCA requires the copyright owner to give the ISP a notification of claimed infringement and file that notification with the court clerk.¹⁶⁶ To ensure that the defendant is a legally accountable person, the notification must identify the copyright work claimed to have been infringed¹⁶⁷ and it must provide “information reasonably sufficient to permit the service provider to contact the complaining party, such as an . . . electronic mail address.”¹⁶⁸ These notification requirements for requesting a DMCA subpoena contain similar procedural safeguards and protections as those iterated in the Supreme Court balancing tests.

VIII. JOHN DOE LITIGATION

John Doe litigation is the alternative method to bring a lawsuit against a defendant while retaining that party’s anonymity. *John*

The minimal showing required for issuance of the subpoena, the lack of notice to the individual user, the requirement of expeditious compliance, and the resultant inability to contest a self-interested assertion that expression is unprotected, fall far short of the procedural protections required by both the First Amendment and the Due Process Clause.

Id.

¹⁶³ Press Release, Verizon Internet Services, Inc., It’s About Privacy—Not Piracy, available at http://newscenter.verizon.com/kit/riaa/vz.vtml?PROACTIVE_ID=cecdcf8cacec7c9cfc5cecfcf5cececdc7c9c9cfacfc6c5cf (last visited Apr. 25, 2005).

¹⁶⁴ See *Verizon II*, 257 F. Supp. 2d at 261 (“[T]he DMCA does not regulate protected expression or otherwise permit prior restraint of protected speech. It only requires production of the identity of one who has engaged in unprotected conduct—sharing copyrighted material on the Internet.”)

¹⁶⁵ Megan M. Sunkel, *And the I(SP)s Have It . . . But How Does One Get It? Examining the Lack of Standard for Ruling on Subpoenas Seeking to Reveal the Identity of Anonymous Internet Users in Claims of Online Defamation*, 81 N.C. L. REV. 1189, 1199 (2003).

¹⁶⁶ See 17 U.S.C. § 512(h)(2)(A) (2000) (“Contents of request—The request may be made by filing with the clerk—(A) a copy of a notification described in subsection (c)(3)(A)”).

¹⁶⁷ See 17 U.S.C. § 512(c)(3)(A)(ii) (2000).

¹⁶⁸ 17 U.S.C. § 512(c)(3)(A)(iv) (2000).

Doe v. 2theMart.com was a California shareholder derivative suit in which the defendants, officers and directors of the company, issued a subpoena to the host of an Internet message board seeking the identity of twenty-three speakers who made anonymous statements regarding the corporation while participating on the message board.¹⁶⁹ The subpoena was issued by the defendants pursuant to the Federal Rules of Civil Procedure and it sought more information than is permitted under the DMCA.¹⁷⁰ Although the subpoena in this case was not brought under the DMCA, the issues the court addressed in making its decision are relevant because John Doe litigation has replaced the DMCA subpoena power as the RIAA's new method of pursuing alleged copyright infringers.¹⁷¹

In deciding whether to grant a subpoena in a John Doe lawsuit, a court must first address the "important and challenging questions of: (1) what is the scope of an individual's First Amendment right to speak anonymously on the Internet, and (2) what showing must be made by a private party seeking to discover the identity of anonymous Internet users through the enforcement of a civil subpoena?"¹⁷² The subpoena clause of the DMCA attempts to answer these questions and codify a process for obtaining a subpoena in limited instances of alleged digital copyright infringement.

A. *The RIAA Should Not Be Forced to Pursue John Doe Litigation When Congress Has Implemented a Procedure for Bringing Digital Copyright Infringement Suits under the DMCA*

In *Verizon I* and *II*, Judge Bates agreed with the RIAA's contention that forcing copyright owners to file John Doe suits to get the identifying information of alleged infringers is senseless.¹⁷³ Ver-

¹⁶⁹ See *2theMart.com*, 140 F. Supp. 2d at 1090.

¹⁷⁰ See *id.* ("[T]he subpoena seeks, among other things, 'all identifying information and documents, including, but not limited to, computerized or computer stored records and logs, electronic mail (E-mail), and postings on your online message boards,' concerning a list of twenty-three InfoSpace users.")

¹⁷¹ On January 21, 2004, the RIAA filed a new batch of lawsuits against computer users who have allegedly been distributing copyrighted music on peer-to-peer networks. "The 532 suits filed today employ the 'John Doe' process, which is used to sue defendants whose names aren't known." Press Release, RIAA, *New Wave of Record Industry Lawsuits Brought Against 532 Illegal File Sharers* (Jan. 21, 2004), available at <http://www.riaa.com/news/newsletter/012104.asp> (last visited Apr. 25, 2005). By the end of 2004, the RIAA had sued 7706 P2P users for alleged copyright infringement. John Borland, *RIAA Files 754 New File-Swapping Suits*, CNET News.com (Dec. 16, 2004), at [http://news.com.com/RIAAfiles+754-ewfile-swapping\\$uits/2110-1027_3-5494259.html](http://news.com.com/RIAAfiles+754-ewfile-swapping$uits/2110-1027_3-5494259.html) (last visited Apr. 25, 2005).

¹⁷² *2theMart.com*, 140 F. Supp. 2d at 1091.

¹⁷³ See *Verizon I*, 240 F. Supp. 2d at 40 ("[A]s Verizon concedes, the burden on service providers is certainly no greater with a DMCA subpoena than with a Rule 45 third-party

izon argued that copyright owners will have recourse if subsection (h) is found to apply only to ISPs under subsection (a).¹⁷⁴ As an alternative, the ISP suggested that the RIAA may bring a “John Doe” action in federal court to obtain information identifying copyright infringers.¹⁷⁵ Judge Bates dismissed Verizon’s suggestion because “there is absolutely nothing in the DMCA or its history to indicate that Congress contemplated copyright owners utilizing John Doe actions in federal court to obtain the identity of apparent infringers, rather than employing the subsection (h) process specifically designed by Congress to address that need.”¹⁷⁶

The RIAA argued that filing a “John Doe action would serve no purpose other than to increase the burden on copyright holders who are attempting to protect their works from unlawful dissemination on the Internet.”¹⁷⁷ Filing suit against an anonymous defendant also precludes opportunity for pre-trial settlement “and thus clog[s] the courts with lawsuits that need never have been brought.”¹⁷⁸ Unlike John Doe lawsuits, the DMCA appears to present a process that allows for alternative dispute resolution in the early phases that will only turn into litigation if the parties are unable to settle.

B. *John Doe Litigation is Unnecessarily Burdensome*

John Doe litigation is unnecessarily burdensome to copyright owners because Congress has devised a process that provides copyright owners with a remedy against infringement in the form of the DMCA. John Doe litigation would, among other things, require plaintiffs to pursue third party subpoenas to seek defendant identification.¹⁷⁹ This is burdensome because

the time and delay associated with filing complaints and pursuing third-party subpoenas in court would undermine the ability of copyright owners to act quickly to prevent further infringement of their copyrights. That is at odds with the design of Congress through the DMCA, which commands “expeditious”

subpoena. The additional burden on copyright owners, however, would be considerable, given the effort and expense associated with pursuing such John Doe suits in court.”).

¹⁷⁴ See *id.* at 39.

¹⁷⁵ *Id.* at 40.

¹⁷⁶ *Id.*

¹⁷⁷ RIAA, *Summary and Highlights of RIAA Reply to Verizon Brief*, at http://www.riaa.com/news/filings/verizon_summary.asp (last visited Apr. 25, 2005).

¹⁷⁸ See *id.*

¹⁷⁹ See *Verizon I*, 240 F. Supp. 2d at 40 (stating that “Congress has noted the vast extent of copyright piracy over the Internet, and growing numbers of suits involving disputes over the sufficiency of allegations of infringement and other issues would, in turn, likely undermine the determination of copyright owners to prosecute such actions.”).

issuance of and response to subpoenas under subsection (h).¹⁸⁰

Counsel for Verizon was aware of the hardship put upon copyright owners. When asked by Judge Bates, “whether John Doe actions might be so expensive that they would ‘scare off’ copyright owners, [Verizon’s counsel] responded that ‘there is that possibility’ given the protections and ‘hoops that have to be gone through under the John Doe suits.’”¹⁸¹

An additional burden is placed upon the federal courts to handle this influx of cases.¹⁸² John Doe litigation will be more complex and thus more timely and expensive than the litigation that would result in connection with DMCA subpoenas.¹⁸³ Judge Bates found John Doe suits to be “less protective of the rights of service providers and Internet users than is the section 512(h) process.”¹⁸⁴ Under either process, the ISP remains a central, significant, and highly involved third-party because it is responsible for transferring requests and information to and from the RIAA and the user.¹⁸⁵

C. *The DMCA Provides for Procedural Safeguards Similar to or More Protective than Those in John Doe Lawsuits*

Requiring copyright owners to pursue John Doe litigation and prohibiting them from using the subpoena power of the DMCA suggests that the two methods of bringing actions for online copyright infringement may be quite different. In fact, because a U.S. Court of Appeals rejected the congressional process under the DMCA, one may hypothesize that the John Doe subpoena must be civilly advantageous to the anonymous defendant. One may *think*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at n.16 (citing Tr. of Hearing (Oct. 4, 2002) at 62).

¹⁸² Federal courts have exclusive jurisdiction of copyright cases. See *Verizon I*, 240 F. Supp. 2d at 40 (citing *NBC, Inc. v. Copyright Royalty Tribunal*, 848 F.2d 1289, 1295 (D.C. Cir. 1988) which held that “the federal courts . . . have exclusive jurisdiction over actions ‘arising under’ the Copyright Act, such as infringement actions.”).

¹⁸³ See *Verizon I*, 240 F. Supp. 2d at 40.

¹⁸⁴ *Id.* at 40. Moreover, “Congress did not, in the Court’s view, contemplate some service providers subject to the DMCA facing expeditious subsection (h) subpoenas, while others would only have to provide information identifying infringers through the slower, more cumbersome process of a John Doe action.” *Id.* at 41.

¹⁸⁵ In addition to the transfer of subpoena request and information, some providers are required to give their users a detailed notice explaining users’ legal rights. In October 2004, a U.S. District Court ruled that ISPs in the Eastern District of Pennsylvania now have the added burden of providing a detailed notice to their customers. See Katie Dean, *File Sharers Win More Protection*, *Wired.com* (Oct. 28, 2004) (in which a spokesman for the RIAA was noted as saying, “We have always encouraged ISPs to inform their subscribers of pending subpoenas. This action by the court is consistent with that.”), at <http://www.wired.com/news/digiwood/0,1412,65516,00.html> (last visited Apr. 25, 2005).

that, however, that may not be the case.¹⁸⁶ Courts are often skeptical of allowing John Doe defendants to be sued, and only allow these cases under certain conditions. They often implement a test similar to the balancing tests referred to above.¹⁸⁷

The DMCA varies slightly from John Doe actions because in the latter, plaintiffs may have to show that the defendant's identity is "unascertainable through the exercise of due diligence."¹⁸⁸ This is not so under the DMCA because it is well understood that the user's ISP is the only entity that can translate the user's Internet Protocol ("IP") address into identifying information.¹⁸⁹ Therefore, the defendant's identity is automatically unascertainable even through due diligence.¹⁹⁰ Because this is the case with many forms of Internet communication, the DMCA does not specifically demand a showing that the defendant's identity is unascertainable. The DMCA does, however, go beyond a usual John Doe subpoena inquiry by requiring that the complaining party provide "a physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed,"¹⁹¹ and by requiring the plaintiff to provide "a statement that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed."¹⁹² These safeguards protect a potential defendant from harassment and false lawsuits by demanding a showing that the complaining party has a legitimate copyright infringement claim.

As just illustrated, the safeguards of issuing a John Doe subpoena are very similar, if not less stringent, than those safeguards laid out in the DMCA. In *Verizon I*, Judge Bates noted that "[n]ot only are John Doe actions more burdensome and less timely, but in

¹⁸⁶ Judge Bates noted that "the requirements for obtaining a section 512(h) subpoena are precisely the type of procedural requirements that other courts have imposed for subpoenas on service providers to identify anonymous posters of messages on the Internet." *Verizon I*, 240 F. Supp. 2d at n.15 (citing *Doe v. 2theMart.com, Inc.*, 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001)).

¹⁸⁷ See *supra* Part VII.

¹⁸⁸ Sunkel, *supra* note 165, at 1199 ("The standard of due diligence requires a good faith, honest effort on the part of the plaintiff to use reasonable effort (not all conceivable means) to discover the identity of the defendant.").

¹⁸⁹ In the digital world of cyberspace, users are most often identified as numbers and not names. ISPs assign numbers to their subscribers each time they use the Internet. Therefore, when a user enters a website, the site knows where the user is coming from according to its numerical Internet Protocol, or IP, address. The RIAA engages in peer-to-peer networking in order to find copyright infringers and through this interaction it is able to ascertain that user's IP address. See Press Release, RIAA, *supra* note 171.

¹⁹⁰ See *id.* ("The lawsuits identify the defendants by their numerical computer address, known as an "IP" or Internet Protocol address.").

¹⁹¹ 17 U.S.C. § 512(c)(3)(A)(i) (2000).

¹⁹² 17 U.S.C. § 512(c)(3)(A)(v) (2000).

several important ways they are less protective of the rights of service providers and Internet users than is the section 512(h) process.”¹⁹³ The DMCA provisions prevent ISPs from being forced to release identity information without a reasonable showing that there has been copyright infringement and provide protection “against overly aggressive copyright owners and unwarranted subpoenas.”¹⁹⁴ There seems to be no reason why copyright owners must abandon the DMCA in favor of the similar, yet more costly and time-consuming process of John Doe litigation.

IX. THE DMCA IS APPLICABLE IN CASES OF COPYRIGHT INFRINGEMENT RESULTING FROM PEER-TO-PEER FILE SHARING

Constant improvements in Internet and communication technologies present the world with opportunities never before considered and others yet to be imagined. Advancements in technology, however, also present increased opportunities for copyright infringement. The DMCA “sought to provide assistance to copyright owners in light of the technological developments surrounding the Internet.”¹⁹⁵ The idea was to create a flexible law that could be meaningful in light of technological improvements – not to develop a limited statute that would become inapplicable as technology improves. Copyright law has consistently tried to keep up with emerging technology, and to be effective, “it must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials.”¹⁹⁶

P2P networks are a major contributor to online copyright infringement.¹⁹⁷ The DMCA was adopted in an attempt to prevent copyright infringement on the Internet, so it is imperative that the

¹⁹³ *Verizon I*, 240 F. Supp. 2d at 40.

¹⁹⁴ *Id.* at 40-41 (“Indeed, [the section 512 requirements] provide greater threshold protection against issuance of an unsupported subpoena than is available in the context of a John Doe action.”).

¹⁹⁵ *Id.* at 37.

¹⁹⁶ S. REP. NO. 105-190, at 1-2 (1998).

¹⁹⁷ While fewer users are sharing files via peer-to-peer networks than were before the RIAA began its legal effort in 2002, that number has been slowly increasing since September 2003. See *Study: Music Piracy Rising*, Wired.com (Jan. 16, 2004) (reporting that the number of U.S. households downloading music from P2P networks “rose 6 percent in October and 7 percent in November after a six-month decline . . .”), at <http://www.wired.com/news/digiwood/0,1412,61943,00.html> (last visited Apr. 25, 2005). A study conducted in April 2004 by the Pew Internet & American Life Project indicated that 18% of Internet users said they download music files. That is an increase from the 14% of users who reported the same in November 2004. However, both figures are significantly lower than the 29% who answered the same in a survey in spring 2003. Mary Madden & Lee Rainie, PEW INTERNET & AMERICAN LIFE PROJECT, *Pew Internet Project and comScore Media Matrix Data Memo*, April 2004, available at http://www.pewinternet.org/pdfs/PIP_File-sharing_April_04.pdf (last visited Apr. 25, 2005).

statute be applicable to infringers using P2P software. It was not the intention of Congress to protect copyright infringers who subscribe to service providers that act as conduits for P2P file sharing.¹⁹⁸ In *Verizon I*, the court could “find nothing in the language or structure of the statute that suggests Congress intended the DMCA to protect only a very limited portion of copyrighted material on the Internet.”¹⁹⁹

If, as Verizon contends, service providers only have such obligations when the infringing material is stored on their systems, then service providers falling within subsection (a)—a large portion of those addressed by the DMCA—would receive the liability protections of the Act without the corresponding obligation to assist copyright owners in identifying infringers.²⁰⁰

Courts should not interpret the DMCA to be so ineffective.

Originally, the Copyright Act did not list photographs as subject matter deserving of copyright protection.²⁰¹ In 1884, the Supreme Court decided the landmark case *Burrow-Giles Lithographic Co. v. Napoleon Sarony* that interpreted the Copyright Act to include photographs, although they were not listed specifically in the text of the statute.²⁰² At the time the Copyright Act was written, photographs had not been invented – the members of Congress could not have even conceived of photography at the time of lawmaking. The Supreme Court considered this fact, and instead of simply finding against copyright protection for photographs, it applied the meaning of the statute’s text to include such protection.²⁰³

¹⁹⁸ Because peer-to-peer users most often swap materials over the Internet that are stored

on their own computers—not on the service providers’ networks—such activity is within subsection (a), not subsection (c). Thus, under Verizon’s reading of the Act, a significant amount of potential copyright infringement would be shielded from the subpoena authority of the DMCA.

See *Verizon I*, 240 F. Supp. 2d at 35.

¹⁹⁹ *Id.* at 35-36.

²⁰⁰ *Id.* at 38 (concluding that “[t]here is no logical connection between the line Verizon seeks to draw and the objectives Congress sought to achieve through the DMCA.”).

²⁰¹ In the 1976 Copyright Act, photographs would be protected as a “pictorial” or “graphic” work. 17 U.S.C. § 102(a)(5) (2000).

²⁰² 111 U.S. 53, 57-58 (1884) (finding statutory copyright protection for a photograph taken by defendant that was reproduced and distributed by Plaintiff without authorization. The plaintiff argued that a photograph is not protectible because it is not a writing or the production of an author since it necessarily reproduces reality. The Supreme Court found copyright protection because an author is “he to whom anything owes its origin” and the term “writing” is meant to include “all forms of writing, printing, engraving, [etc.], by which the ideas in the mind of the author are given visible expression.” (citation omitted)).

²⁰³ The only reason why photographs were not included in the extended list in the act of

1802 is, probably, that they did not exist, as photography, as an art was then

The decision led Congress to amend the copyright statute to include a broader definition of copyrightable material. The Copyright Act now protects “original works of authorship fixed in any tangible medium of expression, *now known or later developed*”²⁰⁴ In the case of peer-to-peer file sharing of copyrighted music, the Supreme Court should take a similar approach.²⁰⁵ The Court should allow the DMCA to encompass new technologies instead of finding it inapplicable with each new development and therefore rendering it useless.

The DMCA was painstakingly created by Congress with the aid of numerous collaborators in all areas of business. Therefore, courts should interpret the statute broadly; leaving it up to Congress to take action if it wishes. District Court Judge Bates decided that “[i]t is not for this Court to second-guess the compromises, negotiations, or even brokered deals that produced the DMCA; rather, the Court’s role is to interpret the statute as enacted by Congress, and the clear language and structure of the DMCA must therefore control.”²⁰⁶

CONCLUSION

Suing its own customers has been a profitable business decision for the RIAA.²⁰⁷ By the end of 2004, the RIAA had sued 7706 people it suspected of distributing its songs through P2P networks.²⁰⁸ For those consumers not wanting to pursue legal proceedings, the RIAA typically settles the suits for roughly \$5000.²⁰⁹ Because it has been gainful, the music industry may choose to pur-

unknown, and the scientific principle on which it rests, and the chemicals and machinery by which it is operated, have all been discovered long since that statute was enacted.

See id. at 58.

²⁰⁴ 17 U.S.C. § 102(a) (2000) (emphasis added).

²⁰⁵ Complicating this assessment somewhat is the fact that two new technology developments underlying the issues in this case — P2P software and “bots,” a software tool used by copyright owners to monitor the Internet and detect unauthorized distribution of copyrighted material — were “not even a glimmer in anyone’s eye when the DMCA was enacted” by Congress in 1998.

Verizon I, 240 F.Supp.2d at 38 (quoting Br. of Amicus Curiae for Public Technology, et al., at p.6).

²⁰⁶ *Verizon I*, 240 F. Supp. 2d at 38 (making reference to *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 460-61 (2002)). The “brokered deals” mentioned by the court refer to the fact that major ISPs were “heavily involved in negotiating these trade-offs in the legislation.” *Id.* at n.11 (quoting S. REP. NO. 105-190, at 9 (1998)).

²⁰⁷ For an analysis of the real and the overestimated effects of the RIAA litigation strategy, see Justin Hughes, *On the Logic of Suing One’s Customers and the Dilemma of Infringement-Based Business Models*, 22 *CARDOZO ARTS & ENT. L.J.* 725 (2005).

²⁰⁸ Borland, *supra* note 171.

²⁰⁹ *See RIAA Fires New Round of Volleys*, *Wired.com* (Sep. 30, 2004), at <http://www.wired.com/news/digiwood/0,1412,65162,00.html> (last visited Apr. 25, 2005).

sue these suits at the cost of its customers instead of pursuing subpoena power under the DMCA. However, the DMCA allows for a simple, stream-lined subpoena process that offers safeguards for protecting alleged infringers. If copyright owners were allowed to proceed under this provision lawfully, the costs for all parties would be diminished.

Creating legislation that can address digital copyright infringement comprehensively is a daunting task. After years of research and collaboration, Congress devised legislation that tackled issues of online copyright infringement in the Digital Millennium Copyright Act. It is true that the technology that helped bring about the copyright infringement claims in *RIAA v. Verizon*, namely peer-to-peer networks, did not exist at the time of the statute's creation. However, it is not true that the statute is incapable of dealing with these new types of claims. The plain text of the statute can be interpreted constitutionally and effectively if section 512(h) is meant to apply to all types of service providers covered by the Act. Future congressional action or a Supreme Court reversal of *Verizon Appeal* should produce such a conclusion.

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